IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No. 64 OF 2000
IN
T& I. J. Suit No. 57 of 1996
in
Petition No. 364 of 1996.

Mars. Hewlett Gonsalves)
daughter of the Deceased)
Appolinairo Ignatius Dias,)
Christian Inhabitant of Mumbai)
aged 61 years, residing at)
9, June Blossoms, 16 Pali Road)
Bandra (W), Mumbai 400 050)
being one of the legatees)... Appellant

vs.

Mr. Hollis Dias s/o. Late)
Appolinairo Ignatius Dias,)
Adult, Christian, Inhabitant)
presenting residing at)
101, Rod Hall Apartments,)
Cooperative Housing Socy. Ltd.)
St. Rocques Rod, St. Sebastian)
Colony, Bandra (W),)
Mumbai 400 050). . Respondent

Mr. Clive D'Souza for appellant
None for respondent.

CORAM: R.M.S.KHANDEPARKAR
AND
D. G. KARNIK JJ.

DATE: June , 8, 2007

ORAL JUDGMENT (Per D. G. KARNIK J.)

1. This first appeal is directed against the judgment and order dated October, 14, 1999 passed by a learned Single Judge of this court in Petition No. 364 of 1996 which was converted into a testamentary suit bearing No. 57 of 1996. By the impugned judgment and order the learned Single Judge dismissed the petition for grant of letters of administration to the will of the deceased Appolinairo Ignatius Dias, for short “the deceased”.

2. Appellant is a daughter and the respondent is a son of the deceased. The case of the appellant is that the deceased died on 22nd February 1988 leaving behind his last will and testament dated 19th March 1987. The deceased was survived by a widow, two sons and a daughter. According to the appellant on 5th March 1989 the original will of the deceased was read out by the respondent in the presence of all the heirs viz. the widow and three children. On demand of the appellant a xerox copy of the will was given to her.

Mother of the appellant died 5 years later in September 1994. After the death of the mother the appellant requested her brother, the respondent herein, who was one of the co-executors to obtain probate of the will but he denied the existence of the will. The appellant therefore filed a petition for letters of administration on the basis of the xerox copy of the will which was given to her by the respondent himself.

3. The respondent entered a caveat and contested grant of letters of administration. He denied that the deceased had ever made a will and also denied that the xerox copy of the alleged will was given by him to the appellant.

4. At the trial the appellant produced the xerox copy of the will which was allegedly given to her by the respondent. She also examined herself on oath and examined two witnesses, viz. Mrs. Roth Piedade, widow of one of the attesting witness and Mr. Vincent Winston Fernandes, a family friend of the deceased. No attesting witness was examined as both the attesting witnesses had died. The respondent did not examine himself nor any witness. He however, cross examined the appellant.

5. After consideration of the oral and documentary evidence adduced by the appellant the learned Single Judge held that the xerox copy of the alleged will dated 19th March 1987 could not be admitted in evidence even as a secondary evidence. He further held that the appellant had not proved that the writing dated 19th March 1987 was true and genuine copy of the alleged original will made by the deceased testator. He further held that the appellant had not proved that the deceased had lawfully executed the will in accordance with the provisions of Section 63 of the Indian Evidence Act and that the xerox copy of the writing dated 19th March 1987 was the said will. In view of these findings the learned Single Judge dismissed the petition of the appellant for grant of letters of administration.

6. In view of the arguments advanced by the learned counsel for the appellant the following points arises for our consideration:

   i) Whether the appellant proves that the xerox copy produced by the appellant (marked as exhibit A for identification) was a true copy of the last will and

testament dated 19th March 1987 allegedly executed by the testator.

ii) Whether the appellant proves that the deceased had made his last will and testament on 19th March 1987 in accordance with the provisions of section 63 of the Indian Succession Act 1925?

7. Our answer to both the points are in the negative for the reasons stated below.

REASONS:

8. The appellant examined herself on oath. In the examination in chief the appellant has stated that her mother died 5 years after the death of her father (the deceased), but the mother did not file any petition for probate of the will. After the death of her mother in September 1994 she made enquiries with the respondent and requested him to obtain probate of the will. However, as he did not apply for probate she has applied for letters of administration, with a copy of the will attached thereto. Perusal of the writing at exhibit A shows

that the deceased had appointed his wife and his son the respondent no.1 as co-executors and trustees of the will. By para 4 of the said writing he had bequeathed all his properties, movable and immovable, to his wife exclusively for her life. She had been given a power to draw and enjoy the interest, rents, dividends, profits and income of the properties to the exclusion of all other natural heirs. If the mother of the appellant was the sole beneficiary for life under the will it would have been natural for her to apply for probate of the will. Section 213 of the Indian Succession Act clearly lays down that no right as the executor or legatee can be established in any court of justice unless a court of competent jurisdiction has granted probate of the will or has granted letters of administration of the will or a valid copy of the will is annexed. Prior to the amendment made to sub section 2 to section 213 of the Indian Succession Act in the year 2002 the section did apply to Indian Christians and therefore the mother could not have established her right as the sole beneficiary for life under the will unless the will was probated. Non application by the mother who survived the

deceased for more than 5 years to establish her right under the alleged will is one of the circumstances which was required to be explained by the appellant, especially when there are other suspicious circumstances, surrounding the alleged will.

9. Except for the petitioner who claims that the will was read out at the residence of the deceased on 5th March 1989 nobody has stated that the will ever existed or that the will was ever read out. The petitioner has not examined anybody who had ever seen the original will. In fact there is no unequivocal statement even by the Petitioner that she had seen the original will. All that she has stated in her evidence is that the will of the father was read out on 5th March 1989 at the residence of the deceased. She has not stated that she had seen the original will. The petitioner stated that initially an ordinary copy of the will was given to her by the respondent and only on her demand he gave her a xerox copy of the will. She has not even stated that she had compared the xerox copy given to her with the original will. The respondent, in his affidavit in reply and in the caveat

has specifically denied that the deceased had made a will and has also denied that the will was read out on 5th March 1989 as alleged by the appellant. He has also denied that he gave a xerox copy of the will to the petitioner. According to the petitioner her mother, herself and her elder brother were present when the will was read out. The appellant has made out no attempt to examine the elder brother to prove that the will was read out on 5th March 1989. Thus apart from the interested word of the appellant herself that the will was read out on 5th March 1989 no other evidence has been produced by the appellant nor has she offered any explanation for her failure to examine the elder brother in support of her contention that the deceased had made a will which was read out on 5th March 1989.

10. Learned counsel for the appellant submitted that since the original will was in the custody of the respondent himself, secondary evidence in the shape of the xerox copy was not admissible under section 66 of the Evidence Act. Section 66 of the Evidence Act says that the secondary evidence of the contents of the documents referred to in section 55 clause

(a) shall not be given unless a party proposing to give such secondary evidence has previously given to the party in whose possession or custody the document is a notice to produce the document as is prescribed by law. Rule 15 of Order 11 of the Civil Procedure Code states that every party to a suit shall be entitled at any time to give notice to any other party to produce documents. Rule 12 of Order 11 enables a party to a suit to apply to the court for an order directing the other party to the suit to make discovery on oath of the documents which are or have been in his possession or power. No notice for discovery or inspection was ever given by the appellant. The respondent, in fact, had denied even the existence of a will much less original being in his possession. In the absence for an attempt for discovery and/ or inspection and in the absence of any notice of production condition laid down under section 66 of the Evidence Act for production of secondary evidence itself was not satisfied. The appellant was therefore not entitled to produce a xerox copy of the will as secondary evidence of the original will.

11. Leaving aside the technical aspect of whether the secondary evidence of the alleged will was admissible or not we are satisfied that the appellant has not taken steps for proving execution of the will by the deceased and the existence thereof at the time of his death. Admittedly no attesting witness has been examined. Though widow of one of the attesting witness was examined, the appellant in her examination in chief did not say anything about the second attesting witness. Reliance is sought to be placed upon her statement made in the cross examination that the second attesting witness had also died. The appellant ought to have stated in her examination in chief about the death of 2nd attesting witness or should have produced some material on record to show that none of the attesting witness was alive and available for giving evidence. An attempt was made to take advantage of the suggestion made by the respondent in her cross examination that atleast one of the attesting witness could have been examined to contend that both the witnesses were dead. Be that as it may, the appellant has not specifically identified signature of the

deceased on the will. No doubt in para 3 of her oral testimony there is a solitary one line statement of the appellant to the effect “my father has signed this writing”. The appellant has not stated that she identified the signature of her father. The appellant has not ever stated that she is conversant with the signature of her father though we may assume that she being a daughter was conversant with the signature of her father. We have only pointed out that the appellant has not specifically stated that she knew her father' signature and was able to identify the signature on the wrting at exhibit A (xerox copy) as the signature of the deceased to show the casual way in which the evidence adduced by the appellant. Under the alleged will the natural line of succession was disturbed to a great extent. Wife was given the whole of the property for her life to the exclusion of all the three children. Though this may be explained by a natural desire on the part of a person to protect his wife after his life, but the distribution of the property after the death of the wife made under the alleged will is not equal. Two sons, one of whom is the respondent,

have been given some paltry amount and few bonds and shares, worth few thousand rupees. The major asset viz. residential house which appears to be located in an up-market locality of Bandra has been bequeathed to the appellant exclusively. Thus the value of the property given to the appellant appears to be several hundreds of times the value of the property bequeathed to the respondent and the other brother of the appellant. The writing exhibit “A” does not disclose any reason for this unequal distribution. Except for one solitary statement made by the appellant in her cross examination that two flats were given to the two brothers by the deceased in his lifetime there is no other evidence or material on record to show that the two brothers of the appellant were in any way provided for by the deceased in his life time. This circumstance of unequal distribution of property amongst the heirs, by the alleged will, especially when it is not the case of anybody that the relations between the deceassed and his sons were not cordial, was required tobe explained by the appellant in her evidence which she has not done.

12. There is a yet another circumstance which was required to be explained by the appellant in her testimony. The deceased was an electrical engineer and appears to be a man of some social standing . He was President of Rest Ranwar Club. In the alleged will, xerox copy of which is at exhibit A, though the deceased has made detailed reference to the various fixed deposits in the banks as well as companies he has omitted to mention the bank accounts as well as some fixed deposits. The appellant in her cross examination admitted that the deceased was well educated person and would not have missed mentioning the bank accounts and fixed deposits in his alleged will. There is no residuary clause in the will bequeathing residue of the estate and therefore omission to mention the properties by the deceased who ordinarily would not have failed to mention them, is significant and is not explained by the appellant in her evidence.

13. Thus assuming that the secondary evidence regarding the contents of the will (in the form of a xerox copy) is admissible the appellant has not been able to dispel the

suspicious surrounding circumstances including palpably unequal distribution of the properties between the heirs especially when the relation between the deceased and his sons were cordial. We are therefore of the view that the appellant has not been able to prove and establish that the writing dated 19th March 1997, xerox copy of which is at exhibit A, to be the last will and testament of the deceased made out of free will and in accordance with section 63 of the Indian Succession Act. There is no merit in the appeal which is hereby dismissed. Since the respondent has not appeared before us at the hearing there shall be no order as to costs.

(R.M.S. KHANDEPARKAR J.)

(D. G. KARNIK J.)